Supreme Court, U.S.
FILED
SEP 18 1995
CLERK

No. 95-139

In The

Supreme Court of the United States

October Term, 1995

COOPER TIRE & RUBBER COMPANY,

Petitioner,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, RICHARD C. PILLSBURY, M.D., and ROBERT MAZA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION ON BEHALF OF RESPONDENT ROBERT MAZA

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RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED

I.

WHETHER THIS COURT SHOULD ADDRESS THE SCOPE OF THE FEDERAL COMMON LAW OF RESTITUTION UNDER ERISA WHERE THE COURT BELOW FOUND AND APPLIED A STATUTORY RIGHT TO THE SAME RELIEF

II.

WHETHER THIS COURT SHOULD SCRUTINIZE THE EIGHTH CIRCUIT'S APPLICATION OF FACTORS DRAWN FROM THE TRUST LAW PRINCIPLES ADOPTED IN *FIRESTONE TIRE & RUBBER CO. v. BRUCH*

III.

WHETHER THE EIGHTH CIRCUIT'S ENFORCEMENT OF THE TERMS OF THE PLAN PRESENTS A QUESTION WORTHY OF REVIEW

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STATEMENT OF THE CASE

Respondent Robert Maza is an employee of Petitioner Cooper Tire & Rubber Company and a participant in its employee welfare benefit plan that is governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. Under the terms of the plan, Petitioner had subrogation rights with respect to payments for medical services or drugs, and the right to consent to any settlement of a beneficiary's claim against third parties for such services or drugs. In 1988, Respondent Maza's wife became ill and incurred $298,118.07 in medical expenses before she died. Petitioner reimbursed Respondent Maza for these expenses as they occurred, requiring him to sign a Receipt and Subrogation Agreement that purported to cover claims made against third parties for nonmedical damages.

In August, 1989, Respondent Maza filed a medical malpractice action against Respondent Richard C. Pillsbury, M.D., based on his wife's death. On his own behalf, Respondent Maza sought recovery for medical expenses and loss of consortium; as administrator of his wife's estate, he sought wrongful death damages for medical expenses, loss of earnings, pain and suffering, and mental anguish. Repondent St. Paul Fire and Marine Insurance Company provided Dr. Pillsbury's defense.

Petitioner intervened in the malpractice case and pursued separate settlement negotiations with Dr. Pillsbury. Eventually, Respondent Maza settled all claims except Petitioner's claim for medical expenses, expressly reserving the "subrogation and other rights of [Petitioner]." After briefly pursuing its claim in state court,

Petitioner filed this case in the United States District Court for the Western District of Arkansas.

After a bench trial, the court determined that Respondent Maza breached his contractual obligations to Petitioner, and that Respondents Pillsbury and St. Paul had intentionally interfered with that contract. The court imposed joint and several liability on the Respondents for $298,118.07 plus prejudgment interest of $53,661.25.

On appeal, Respondents principally argued that Petitioner waived its right to approve the settlement by engaging in separate negotiations. The Court of Appeals declined to resolve the case on this basis, noting instead that Petitioner's welfare benefit plan provided for subrogation rights with respect to covered medical services and drugs, but neither the plan nor the Summary Plan Description informed participants that Petitioner would seek a right to consent or first-dollar recovery on claims of any type against a third party. These rights were set forth in the Receipt and Subrogation Agreements, but those documents were presented to Respondent Maza only after his wife became entitled to benefits. Reviewing Petitioner's interpretation of its plan under a deferential standard, the court nevertheless found that Petitioner had abused its discretion in this case.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD NOT ADDRESS THE SCOPE OF THE FEDERAL COMMON LAW OF RESTITUTION UNDER ERISA WHERE THE COURT BELOW FOUND A STATUTORY RIGHT TO THE SAME RELIEF

Petitioner asserts a conflict among circuits regarding implication of common law causes of action, but the issue was neither raised nor decided below. As the administrator and a fiduciary of its plan, *see* 29 U.S.C. § 1002(21)(A), Petitioner was entitled to bring an action seeking enforcement of its plan through "appropriate equitable relief," *id.* § 1132(a)(3)(B), such as restitution for unjust enrichment. To the extent that *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985 (4th Cir.), *cert. denied*, 498 U.S. 982 (1990) and *Pacificare, Inc. v. Martin*, 34 F.3d 834 (9th Cir. 1994) support such a statutory right, they are consistent with one another and neither is in conflict with this case. The lower courts accordingly recognized that section 1132(a)(3) itself was the basis for Petitioner's action, and the Court of Appeals found it unnecessary to determine whether the relief awarded by the District Court was "appropriate equitable relief." App. at 10-11 & n.7.

Thus, the conflict asserted by Petitioner is irrelevant to this case, and is of diminishing importance even where common law causes of action are at issue. Emerging interpretations of ERISA's definition of "fiduciary" have made the section 1132(a)(3) right to equitable relief broadly available to administrators, insurers and health maintenance organizations. *See Provident*, 906 F.2d at 988

n.5 (finding common law right to restitution but noting that insurance company "probably could have sued under § 1132(a)(3)"); *Pacificare*, 34 F.3d at 838 (pointing to statutory right while declining to find common law remedy for HMO).

The weakness in Petitioner's argument, then, springs not from any limitation on the method of redress,[1] but from the Congressional directive that such methods are available only to "enforce the terms of the plan." 29 U.S.C. § 1132(a)(3). Petitioner's employee welfare benefit plan simply did not contain the terms Petitioner would have this Court impose on Respondent Maza. Thus, the Eighth Circuit opinion is of little consequence beyond this case, and presents no question worthy of consideration by this Court. Its primary significance is as a warning to plan sponsors to include all material terms in the plan documents, rather than to attempt to graft them onto the plan after a claim for benefits has been made.

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[1] Although Petitioner's complaint characterized its cause of action against Respondent Maza as one for "breach of contractual provisions," and the trial court adopted this theme – repeatedly finding that Maza "breached" the Receipt and Subrogation Agreement, App. at 34, 40, 42 – the Eighth Circuit found it unnecessary to resolve the case on the basis of whether the relief Petitioner sought actually was "appropriate equitable relief." *Cf. Buckley Dement, Inc. v. Travelers Plan Admin.*, 39 F.3d 784 (7th Cir. 1994) (reimbursement action seeking compensatory damages was not traditional injunctive, restitutionary, noncompensatory type of relief, and therefore failed to state a claim under § 1132(a)(3)(B)).

II.

THE EIGHTH CIRCUIT APPLIED FACTORS DRAWN FROM THE TRUST LAW PRINCIPLES ADOPTED IN *FIRESTONE TIRE & RUBBER CO. v. BRUCH*

The Eighth Circuit's multi-factor test for abuse-of-discretion review is drawn from the very principles adopted by this Court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) (adopting Restatement (Second) of Trusts, § 187 cmt. d (1959)). The Restatement there identifies the "[f]actors" to be used "in determining whether there is an abuse of discretion." Section 187 cmt. d. The same section is, of course, the source of the multi-factor test first adopted by the Eighth Circuit in *Finley v. Special Agents Mutual Benefit Ass'n*, 957 F.2d 617, 621 (8th Cir. 1992), and that it applied below. App. at 15. *See Cox v. Mid-America Dairymen, Inc.*, 965 F.2d 569, 572 (8th Cir. 1992) (Restatement § 187, cmt. d, factors are "essentially the same" as those set out in *Finley*). Petitioner quibbles, then, only with minor variations on the established theme of deferen[illegible] to plan administrators.[2]

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[2] There may be cases in which emerging ERISA issues ought to be decided or conflicts among circuits resolved. (Lower courts do not, for example, agree as to the effect of a fiduciary's conflict of interest. Compare *Brown v. Blue Cross & Blue Shield*, 898 F.2d 1556 (11th Cir. 1990) (fiduciary's conflict of interest shifts burden of proof), *cert. denied*, 498 U.S. 1040 (1991) with *Pagan v. Nynex Pension Plan*, 52 F.3d 438 (2d Cir. 1995) (conflict of interest a factor that does not change standard of review). The Eighth Circuit has rejected *contra proferentum* in ERISA cases; other courts apply the doctrine. Compare *Brewer v. Lincoln National Life Ins. Co.*, 921 F.2d 150 (8th Cir. 1990), *cert. denied*, 501 U.S. 1238 (1991) with *Nightingale v. Blue Cross & Blue Shield*, 41 F.3d 1476 (11th Cir.) (adhering to precedent adopting *contra*

Nothing in the Eighth Circuit's opinion suggests that it found Petitioner unreasonable in requiring execution of additional documents. Rather, the Court of Appeals found fault with Petitioner's attempt to effect *material change* in the plan's terms through side agreements entered following a claim for benefits. *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293 (7th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 308 (1993), does not conflict with this case, since the subrogation side agreements in that case were consistent with the terms of the plan at issue.

III.

THE EIGHTH CIRCUIT'S ENFORCEMENT OF THE TERMS OF THE PLAN DOES NOT PRESENT A QUESTION WORTHY OF REVIEW

The Eighth Circuit's decision should not be disturbed, for it recognizes that the plan's written provisions are at the heart of this dispute. It defies reason to suggest that the court below exceeded its authority by deciding the case on that antecedent and dispositive ground. *See*, e.g., *Kamen v. Kemper Fin. Serv., Inc.*, 500 U.S. 90, 99-100 (1991) (appellate court may decide case on basis of legal issue overlooked by parties). Despite Petitioner's argument to the contrary, other circuits have acknowledged that "litigants' failure to address the legal question from the right perspective does not render [the court] powerless to work the problem out properly. A court of appeals may and often should do so unbidden rather than apply an incorrect rule of law to the parties' circumstances."

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proferentum), *cert. denied*, ___ U.S. ___, 115 S. Ct. 2002 (1995). This case does not present any of these genuine conflicts that may someday warrant the Court's attention.

Williams-Guice v. Board of Educ., 45 F.3d 161, 164 (7th Cir. 1995); *see also Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement*, 962 F.2d 1192, 1195 n.4 (6th Cir. 1992) (determining applicable law that was not addressed by the parties).

The terms of the written plan, although overlooked by the parties to this case, hold a special place in the administrative scheme. Every employee benefit plan must be established and maintained pursuant to a *written* plan; this is one of ERISA's "core functional requirements." *Curtiss-Wright Corp. v. Schoonejongen*, ___ U.S. ___, 115 S. Ct. 1223, 1230 (1995). "In the words of the key congressional report, '[a] written plan is to be required in order that every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan.' " *Id.* (emphasis in opinion) (quoting H.R. Rep. No. 93-1280, p. 297 (1974)).[3] Here, Petitioner's written instrument gave the plan subrogation rights only as to medical expense claims of beneficiaries. After Respondent Maza became entitled to benefits, however, Petitioner sought through side agreements to claim

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[3] The statute and the regulations promulgated under it require plan administrators to give every participant a Summary Plan Description, which must set forth the terms of the plan, 29 U.S.C. §§ 1024(b)(1)(A), 1021(a)(1), 1022(a)(1), and must be accurate, reasonably comprehensive, and written in a manner meant to be understood by the average plan participant, *id.* § 1022(a)(1). Regulations prohibit the distribution of an SPD whose format has the effect of misleading, misinforming, or failing to inform participants and beneficiaries. 29 C.F.R. § 2520.102-2(b). Any exceptions, limitations, reductions and restrictions applicable to benefits may not be minimized or obscured in that description.

additional subrogation rights. The Eighth Circuit did not err in refusing to allow Petitioner to disregard its plan in this way; there was thus no "depart[ure] from the accepted and usual course of judicial proceedings . . . call[ing] for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1(a).

CONCLUSION

The writ should not issue.

Respectfully submitted,

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